SUPREME COURT OF THE UNITED STATES.

No. 210.—October Term, 1928.

Hart Refineries, Appellant, vs. W. E. Harmon, as Treasurer of the State of Montana.	Appeal from the Supreme Court of the State of Montana.

[February 18, 1929.]

Mr. Justice Sutherland delivered the opinion of the Court.

A Montana statute (§§ 2382 and 2383 Revised Codes 1921, as amended by c. 186, Laws 1925) levies an excise tax upon distributors and dealers engaged within the state in the business of refining, manufacturing, producing, or compounding gasoline or distillate and selling the same in the state, and also upon those engaged within the state in the business of shipping, transporting, or importing any gasoline or distillate into the state and selling the same in the state after it has been brought to rest therein. The basis of the tax is the *sale* of gasoline or distillate, and the statute, in that respect, makes no discrimination, except that it properly excludes from the operation of the tax the imported commodity while it continues subject to the commerce clause of the Constitution. *Raley & Bros.* v. *Richardson*, 264 U. S. 157, 159. Thus far the validity of the statute is conceded.

But the contention is that the statute discriminates against the Montana refiner because it is not extended to include gasoline or distillate shipped from other states and consumed or used after it has come to rest in Montana and its status in interstate commerce has ended. Upon this ground the statute is challenged as constituting a denial of the equal protection of the laws, in contravention of the Fourteenth Amendment to the federal Constitution. The Supreme Court of Montana upheld the statute as valid, 81 Mont. 423, following its earlier decision in *State* v. *Silver Bow Refining Co.*, 78 Mont. 1, 19, where it was held that, while a tax upon the sale of imported oil after it had come to rest in the state or upon such oil as property would be valid, any attempt to lay a tax upon products shipped into the state for consumption only would be a burden upon interstate commerce.

This holding, as it was applied to the contention in the present case, seems to have been the result of a too literal reading of *Sonneborn Bros.* v. *Cureton*, 262 U. S. 506, which was cited as authority. In that case, this Court, upon a full review of the earlier cases, held that when a commodity shipped from another state had come to rest as a part of the stock in trade of the dealer, the interstate transportation was at an end, and whether in the original packages or not a state tax upon the commodity, either as property or upon its sale in the state, if laid on the commodity generally without regard to its origin, would not constitute a burden upon or be a regulation of interstate commerce of which the commodity had been the subject. But there is nothing in the opinion to suggest that the taxing power of the state is limited to the two kinds of taxes mentioned. Interstate transportation having ended, the taxing power of the state in respect of the commodity which was the subject of such transportation, may, so far as the commerce clause of the federal Constitution is concerned, be exerted in any way which the state's constitution and laws permit, provided, of course, it does not discriminate against the commodity because of its origin in another state. That under such circumstances a tax may be imposed upon the use as well as upon the sale of the commodity in domestic trade, without coming into conflict with the commerce clause, was specifically determined in *Bowman* v. *Continental Oil Co.*, 256 U. S. 642, 648.

But because the state legislature could have laid a tax upon the use of the commodity as well as upon its sale, it by no means follows that a failure to do so constituted a discrimination forbidden by the equal protection clause of the Fourteenth Amendment. That clause does not prohibit classification; and the power of the state to classify for purposes of taxation is of wide range and flexibility, provided that the classification rest upon a substantial difference so that all persons similarly circumstanced will be treated alike. Statutes which tax one class of property while exempting another class necessarily result in imposing a greater burden upon the property taxed than would be the case if the omitted property were included. But such statutes do not create an inequality in the constitutional sense. Nor is the imposition of an excise tax upon one occupation or one activity from which other and different occupations or activities are exempt, a denial of equal protection. It is enough if all in the same class are in-

cluded and treated alike. These propositions are so firmly established by repeated decisions of this Court that further discussion is unnecessary. *Bell's Gap R'd Co.* v. *Pennsylvania*, 134 U. S. 232, 237; *Home Ins. Co.* v. *New York*, 134 U. S. 594, 606; *Keeney* v. *New York*, 222 U. S. 525, 536; *Citizens' Telephone Co.* v. *Fuller*, 229 U. S. 322, 329-331; *Merchants' Bank* v. *Pennsylvania*, 167 U. S. 461, 463; *American Sugar Refining Co.* v. *Louisiana*, 179 U. S. 89, 92; *Pacific Express Company* v. *Seibert*, 142 U. S. 339, 350; *Southwestern Oil Co.* v. *Texas*, 217 U. S. 114, 121; *Brown-Forman Co.* v. *Kentucky*, 217 U. S. 563, 572; *Oliver Iron Co.* v. *Lord*, 262 U. S. 172, 179.

The difference between an excise tax based on sales and one based on use of property is obvious and substantial. If the state sees fit to tax one and not the other, there is nothing in the federal Constitution to prevent; and it is not for this Court to question the wisdom or expediency of the action taken or to overturn the tax upon the ground that to include both would have resulted in a more equitable distribution of the burdens of taxation.

Judgment affirmed.

No. 490.—October Term, 1928.

Hart Refineries, Appellant, vs. The State of Montana. } Appeal from the Supreme Court of the State of Montana.

[February 18, 1929.]

Per curiam: Upon consideration of the jurisdictional statement heretofore filed, and following the view expressed by the Supreme Court of Montana, we entered an order dismissing the appeal in this case as frivolous upon the authority of *Raley & Bros.* v. *Richardson*, 264 U. S. 157, 159. — U. S. —. Upon the authority of *Hart Refineries* v. *Harmon*, *ante*, p. —, decided this day, presenting precisely the same question, that order is now vacated and the judgment below is

Affirmed.

PETITION FOR REHEARING OF APPELLANT.

Comes now the appellant, Hart Refineries, and presents this, its petition for a rehearing of the above entitled cause, and in support thereof respectfully shows:

That this Honorable Court sustained the contention of appellant in holding that the commerce clause of the Federal Constitution did not prevent a state from taxing the use as well as the sale of gasoline, as long as it did not discriminate against a commodity because of its origin in another state.

One question escaped the attention of the Court concerning the application of the 1925 Act, itself, showing the discrimination in the tax among those within the same classification, and not in conflict with the finding of the Court.

It appears that the Court took into consideration on the question of classification, only the question as it related to the extension of the 1925 act to tax the use of gasoline, and did not consider the alleged inequalities of the 1925 Act, itself, in its capacity as a sales tax, with regard to the classes discriminated against.

The Act of 1925, sec. 2382, provides that the Montana refiner shall pay a tax of two cents a gallon on what he refines and sells, and that the distributor shall pay a tax of two cents per gallon on what he ships, transports or imports into the state and which is "SOLD BY HIM WITHIN THIS STATE, AFTER IT HAD ARRIVED IN AND WAS BROUGHT TO REST WITHIN THIS STATE."

The effect of this tax is to exempt all gasoline from the tax, which is shipped to Montana for sale, or in consequence of a sale, after it has arrived in Montana and its interstate commerce status is ended, but before the same

is resold after coming to rest in Montana. Thus the Montana distributor who sells imported gasoline, may after it has arrived in the state for sale, sell the same before it is brought to rest, tax free, then bring it to rest and deliver the same. Its effect is illustrated later.

That gasoline imported into the state from a sister state for sale, or in consequence of a sale, after its arrival in the state, even before it has been brought to rest in the state, is taxable the same as other property within the state, is well established in this Court.

In Wagner v Covington 251 U. S. 102, 103, the Court said:—

> "The distinction between state regulation of peddlers and attempt to impose like regulations upon drummers who solicit sales of goods that are to be thereafter transported in interstate commerce has always been recognized. In Robbins v Shelby taxing District 120 U. S. 489; 30 L. Ed. 694, Mr. Justice Bradley, who spoke for the Court said 'When goods are sent from one state to another for sale, or in consequence of a sale, they become part of the general property, and amenable to its laws; providing that no discrimination be made against them as goods from another state, but only taxed in the usual way other goods are.' Brown v Houston 114 U. S. 622; 29 L. Ed. 257; Howe Machine Co. v. Gage 100 U. S. 676; 25 L. Ed. 754.
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> "We have, then, a state tax upon an itinerant vendor of goods as carried on within the state—a tax applicable alike to all such dealers, irrespective of where the goods are manufactured, and without discrimination against goods manufactured in other states. It is settled by repeated decisions of this Court that a license regulation or tax of this nature, imposed by a state with respect to the making of such sales of goods within its borders, is not to be deemed a regulation of or direct burden upon

interstate commerce, although enforced impartially with respect to goods manufactured without as well as within the state, and does not conflict with the "commerce" clause. Woodruff v. Parham, 8 Wall. 123, 19 L. Ed. 282, 287. Howe v Gage 100 U. S. 676, 25 L. Ed. 754, Emmert v Missouri 156 U. S. 296; 39 L. Ed. 430; Baccus v Louisiana 232 U. S. 334; 58 L. Ed. 627."

Brown v Houston, 114 U. S. 634, 635.

Askern v Continental Oil Co. 252 U. S. 449, 450.

Woodruff v Parham, 73 U. S. 145, 146.

Howe Machine Co. v Gage 100 U. S. 679.

Robbins v Shelby Taxing District, 120 U. S. 599, 500, 501.

12 Corpus Juris page 27, sec. 25, and notes 2, 31.

That appellant's complaint made this discrimination a ground for claiming the invalidity of the tax, as affecting parties within the same classification is shown by the allegations of the complaint, set forth in appellant's brief in this Court as follows:

(Brief. P. 12, Par. 3.) "That none of said persons, corporations or concerns engaged in refining gasoline and transporting and shipping the same into Montana, and in the sale thereof inside and outside of the State of Montana to their respective customers in the State of Montana BEFORE THE SAME HAS ARRIVED AND BEEN BROUGHT TO REST IN MONTANA AND THEN RESOLD, WAS REQUIRED TO PAY TWO CENTS PER GALLON AS A LICENSE TAX or any other tax upon the sale of said gasoline and distillate. (R. 5, Par. XII.)"

Also, at Page 13, Brief, Paragraph 5:

"That under said law the plaintiff is required to pay two cents per gallon license tax on each gallon sold for the privilege of conducting its business, but said competing foreign corporations, being competitors of plaintiff, solicit and ship orders to dealers and non-manufacturing distributors and consumers in plaintiff's territory, and SELL SAID

PRODUCTS BEFORE THEY ARRIVE AND ARE BROUGHT TO REST IN THE STATE OF MONTANA, AT A PRICE OF TWO CENTS PER GALLON LESS THAN THE MARKET PRICE, by deducting two cents per gallon which plaintiff is required to pay under said law, but which neither said competitors, dealers, non-manufacturing distributors nor consumers are required to pay on such as is transported from without the state AND IS NOT RESOLD AFTER BEING BROUGHT TO REST IN MONTANA. (R. 6, 7. Par. XVIII.) That by reason of this discrimination of two cents per gallon the plaintiff is unable to compete in its territory with said corporations from other states in securing the business of non-manufacturing distributors, dealers, users and consumers.

This is further referred to in appellant's argument at Page 27 of appellant's brief as follows:

> "This law requires the Montana refiner to pay two cents per gallon on all gasoline and distillate he manufactures and sells."
>
> "It does not require such tax on such as is shipped by distributors or dealers in Montana, from sister states, until it is SOLD, after it is brought to rest in Montana."

This Court, in its opinion in this case said:

> But because the state legislature could have laid a tax upon the use of the commodity as well as upon its sale, it by no means follows that a failure to do so constituted a discrimination forbidden by the equal protection clause of the 14th Amendment. That clause does not prohibit classification; and the power of the state to classify for purposes of taxation is of wide range and flexibility, *provided that the classification rest upon a substantial difference so that all persons similarly circumstances will be treated alike.* . . . . . It is enough if all included in the same class are treated alike."

But under said 1925 tax, as it stood, parties within the classification affected are not treated alike but there were discriminations vitally affecting the equal application of the tax within such classifications.

There are two classes affected under this law, (1) Sellers; who constitute the parties who sell gasoline, which includes the Montana refiner, the foreign refiner, who sells in Montana and the distributor in Montana who sells imported gasoline in Montana, and (2) Consumers: who constitute parties who consume gasoline purchased either from the Montana refiner, or the imported gasoline. Within these respective classifications the 1925 tax has permitted drastic, unjust and arbitrary discriminations.

In so far as the Legislature considered it had authority, without violating the commerce provision of the Federal constitution, it was the intention of said law that the consumer should be the one upon whom the burden of the tax would eventually fall. It was the consumer of the gasoline who would use the roads and highways. The tax was imposed for the express purpose of constructing and maintaining roads and highways. This being the case the consumers constituted one class affected by the tax, and all consumers in Montana must be included therein.

Under this tax there was a discrimination and inequality as between the members of the classification of consumers, and of sellers. A consumer who bought gasoline refined in Montana, or from a distributor who sold gasoline imported or shipped from a sister state, *after* it was brought to rest in Montana, had to bear the the tax.

A consumer who bought gasoline refined in Montana, had to have passed on to him, the two cent tax the refiner had to pay or the refiner had to pay the tax without recovering the same. If such consumer bought from a distributor who was dealing in gasoline imported from a

sister state, who sold such gasoline *after* it had been brought to rest in Montana, the consumer had to have passed on to him the two cent tax such distributor had to pay, or such distributor had to pay the tax without recovering the same. If, however, a consumer purchased gasoline from a Montana distributor who sold imported gasoline to such consumer, before the gasoline was brought to rest in Montana, such consumer did not have to have the tax passed on to him as this distributor evaded the payment of the tax and sold it tax free, and such consumer escaped the enhanced price of the added tax.

In other words, the consumer was penalized two cents a gallon for buying the Montana product or for patronizing a distributor who did not sell *until* the product had been brought to rest. The distributor who tried to evade the tax was rewarded for his subtilty, by taking the markets away from those who paid the tax, to-wit: from his brother distributor who paid the tax and the Montana refiner who paid the tax, or his competitor forced the Montana distributor or refiner to bear the tax to hold the business.

For example, take two transportation companies A, and B, competing with each other. Their entire business is the use of the highway, for the construction and maintenance of which said tax was imposed. Each has its place of business in the same city, has an equal amount invested in business, and competition is keen. Each has the same protection of the laws and use of the highways. The business consists in the transportation of freight and passengers covering the neighboring territory. If A buys gasoline produced by a Montana refiner, he is required to stand the burden of the tax; if he purchases from the distributor who sells imported gasoline, after it has been brought to rest in Montana he then has to stand the burden of the tax. If, however, B, his competitor, buys

from the distributor who deals in imported gasoline, and in order to evade the tax, sells it *before* the gasoline has been brought to rest in Montana, neither he nor the consumer has to pay the tax, and the consumer purchases his gasoline tax free, and freed from the burden of the tax; if B buys from the out of state refiner and ships to himself he pays no tax.

It is apparent that in keen competition A cannot compete with B in securing business, and he is forced to quit business, or do business under an unjust discrimination in favor of his competitor, or is driven to purchase the tax free gasoline, thus depriving the state of the revenue and the Montana refiner a customer. And Montana refiners are unjustly discriminated against in favor of imported products.

This discrimination is further shown by the following illustrations:

Tank cars or barrel lots may be shipped to Missoula from Spokane over the Northern Pacific railway, for transfer to and delivery on the Milwaukee tracks in its Missoula yards, where consumers and distributors have receptacles for receiving gasoline in car load lots. When it arrives at Missoula on the Northern Pacific railway tracks, it may be detained after such arrival until sold and paid for. Thereupon the gasoline may complete its journey and come to rest on the Milwaukee tracks in the Milwaukee yards and be received by said purchasers, tax free.

The Spokane shipper telegraphs to the Missoula distributor that on a certain day tank car and barrel lots of gasoline will reach Missoula on the Northern Pacific Railway destined for the Milwaukee yards, tax free. The distributors sell to their customers before it comes to rest in the Milwaukee yards, tax free. Also the refiner located in a sister state may establish his sales agent in the same

city with the Montana refiner, and ship his products, not bring them to a state of rest until after they are sold, then bring them to rest and deliver, tax free. It brings about the following situation:

"A". The Montana refiner produces and sells in this state 1,000,000 gallons of gasoline and distillate per year. This would require it to pay to the state a license tax of $20,000.00 per year for the privilege of conducting its business and selling its products; whereas, its competitor, B company, which manufactured 1,000,000 gallons of gasoline and distillate in an adjoining state, ships the products into this state at suitable intervals. After a shipment has reached this state and has influenced the market by being here in competition, but before coming to a state of rest, B Company, which has procured bills of lading ships its products to itself, or agent, in suitable quantities for sale to consumers, makes sales in Montana, by its agent, of said gasoline to consumers, tax free, receives payment, assigns the respective bills of lading to the respective purchasers for consumption, then the product is brought to a state of rest, and is received by the consumers, and B Company is not required to pay any license tax whatever, and the Montana refiner is deprived of the business, and is unable to compete for the business, or he must bear the burden of the tax without recovering it from the consumer, if he holds the business.

It was the clear intention of the Montana legislature to pass the burden of the tax to the consumer of gasoline. It was not their intention that the burden of this tax should remain on the seller. This thought is carried out from the fact that this law is a road measure and is for the purpose of raising revenue for the sole purpose of building and maintaining roads. It was assumed that the amount of gasoline consumed measured fairly the use which the consumer made of the roads. If the legislature

had laid the tax directly on the consumer all would have been well and the unjust discrimination as between consumers in the same class or between sellers in the same class would not have existed. To avoid the difficulty and expense of directly taxing the consumer, the seller was forced against his will and without remuneration to collect the tax. Furthermore if this law is held valid the seller is forced to pay the amount of the tax to the State even tho owing to tax free competition he has no power to collect same. The method used was to call the tax an excise tax applied to the Montana sale. It is obvious that under this law as framed the out of State seller and even the seller within Montana who sells before the imported gasoline comes to rest within the State, is not reached and does not have to pay the tax. These last mentioned sellers may deliver the gasoline to the consumer and the consumer does not have to stand the tax. In fact no tax is paid. If the consumer purchases from a Montana refiner or from any seller who sells after imported gasoline comes to rest in the State, the tax on the gasoline must be paid if this law is held valid. Whatever the form of the law, whatever it is called, however it is applied, it was the clear intention of the legislature to make the gasoline consumer constitute the class to finally receive the burden of the tax. If this is so it seems clear from the nature of the law and its purpose that all consumers of gasoline in Montana must be included in the class for taxation. If then those consumers who purchase from Montana refiners and sellers must bear the tax, and those consumers who purchase from out of State sellers, or from Montana sellers who sell before imported gasoline comes to rest, do not have to pay the tax, the tax is not applied equally to all in the same class. The law should be declared unconstitutional and void for this reason.

The iniquity of this discrimination between consumers

increases by its own action. From the admitted facts in this case it may be reasonably inferred that at least one third of the consumers in Montana are so situated that they can buy out of State gasoline and save the entire 2c per gallon tax. They have used the roads without being taxed for their construction and maintenance. The other two thirds because of quantity purchased, transportation costs, or other causes must buy within the State in which case they are burdened with the full 2c per gallon tax. The State then receives only two thirds of the expected revenue. The cost of the roads being a fixed sum the tax must be raised to 3c per gallon. While still placing no burden on the out of State buyers the burden on the portion of the class which must bear the tax is increased by half. This in turn induces more consumers to buy out of State with further increase of the burden of those who pay. This thought is not a mere theory as the State did actually increase the tax to 3c, but happily under a better form of law.

It is possible that because this law in an indirect manner and technically makes it appear that the seller is the class being taxed we must still retain that thought as the alternative, if the principle above presented that the consumer is the class bearing the tax is not accepted. In such case it seems that the court must follow out the intent of the legislature. Even tho the consumer did not constitute directly the class to be taxed, it was clearly the class upon which the burden of the tax was to fall. Even tho the seller then is designated as the class to be taxed, the class is not complete for the end sought, and to avoid discrimination, unless all sellers to Montana consumers are included. In their relations as sellers to Montana consumers, Montana refiners, Montana sellers and out of State sellers are all similarly circumstanced and must be included in the same class. As the law reaches only Mon-

tana refined gasoline and imported gasoline after it comes to rest, and is sold, and as it does not reach imported gasoline sold in Montana to Montana consumers before it comes to rest in the State, it is clear that the whole class is not reached. Therefore the tax discriminates as between sellers in the same class. It follows that if all in the same class cannot be reached this form of law should be declared unconstitutional and void.

This law, properly or improperly, intended to use the Montana refiners and sellers only as collectors of the tax. Its working made them pay it whether or not they collected it by allowing sellers in the same class, of out of state gasoline, to sell to consumers in Montana tax free. This law should have passed the burden of taxation to Montana consumers in the same class equally. Its working allowed consumers who bought out of State gasoline to get it free from tax burden while forcing consumers in the same class, of Montana refined gasoline to stand the entire and thereby increased burden.

A law so failing in intent and discriminating so unjustly and increasingly should not be allowed to stand.

For the foregoing reasons it is respectfully urged that this petition be granted, and that the judgment of this Honorable Court be, upon further consideration, reversed.

Respectfully submitted,

JOHN E. PATTERSON,
Counsel for Appellant.

CERTIFICATE OF COUNSEL.

I, John E. Patterson, counsel for the above-named Hart Refineries, appellant, do hereby certify that the foregoing petition for a rehearing of this cause is presented in good faith and not for delay.

JOHN E. PATTERSON,
Counsel for Appellant.